IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 12 of 2000

in

FIRST APPEALNo 7389 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKAR and

MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PARVEZ RUSTAMJI BHARDA

Versus

NAVROJJI SORABJI TAMBOLY DECEASED

Appearance:

MR ZUBIN F BHARDA for Appellant

CORAM : MR.JUSTICE C.K.THAKKAR and
MR.JUSTICE P.B.MAJMUDAR

Date of decision: /02/2000

CAV JUDGEMENT

Per Thakker, J.:

This appeal is instituted by the appellant against summary dismissal of First Appeal No. 7389 of 1998 by the learned Single Judge on December 9, 1999.

The case of the appellant is that there is a trust known as "Navsari Malesar Behdin Anjuman Trust", at Navsari registered under the Bombay Public Trusts Act, 1950 (hereinafter referred to as `Act'). According to the appellant, before 1950 Act came into force, there was Parsi Public Trust Act and the trust was registered under that Act. After 1950 Act came into force, it was registered under the present Act. It is also the case of the appellant that Change Report No. 722 of 1984 was filed for addition of two members in the Managing Committee of the trust. The allegation of the appellant is that without following the procedure prescribed under the Act, Rules and the trust deed, the Change Report was granted by the Assistant Charity Commissioner on February 25, 1987. An appeal against the said order was dismissed by the Joint Charity Commissioner on May 4, 1989. Being aggrieved by the said order, Misc. Civil Application No. 160 of 1989 was filed by the appellant under Section 72 of the Act in the District Court which came up for hearing before the Assistant Judge, Valsad, who by his judgment and order dated September 30, 1998 dismissed the application. Since the appellant was not satisfied by the order passed by the Assistant Judge , he preferred First Appeal No. 7389 of 1998 which was summarily dismissed by the learned Single Judge on December 9, 1999. Learned Single Judge, in the impugned order, observed that the authorities below ,after appreciating the facts and circumstances, recorded a finding that respondent No.1 was entitled to become a member of the trust and of the Managing Committee and there was no reason to interfere with the said finding based on evidence. It is this order which is challenged by the appellant in the present LPA.

When Mr. Bharda for the appellant started arguing the matter on merits, we posed a question to him as to how LPA would be maintainable. He submitted that the order passed by the learned Single Judge was in FA and hence, under Clause 15 of the Letters Patent of Bombay as applicable to this Court, an intra-court appeal against a "judgment" rendered by a Single Judge in FA would be

competent and accordingly, the appellant has filed the present LPA which is required to be decided on merits.

In our view, present LPA was not maintainable as the point was covered by the decision of the Division Bench of this Court in Hiragar Dayagar vs. Ratanlal, (1972) 13 GLR 181, wherein, the Division Bench of this Court held that first appeal from an order passed by the District Court under the Bombay Public Trusts Act,1950 would be in the nature of second appeal. No LPA, therefore, , as of right, under Clause 15 of the Letters Patent would lie and such appeal would be competent only after getting certificate of fitness as required by Clause 15. Learned counsel stated that he was not aware of the said decision. He,therefore, sought some time which we granted. Thereafter, we have heard the learned counsel at length.

It was submitted by Mr. Bharda that LPA against an order passed by the learned Single Judge in FA is maintainable. He submitted that the nomenclature given to the proceedings initiated by the appellant in this court is First Appeal and hence, LPA would be maintainable. He conceded that the decision of the Division Bench of this Court in Hiragar Dayagar has covered the point and it is against the appellants, but almost in similar circumstances, a question had come up for consideration before High Court of Bombay in Khivaraj Chhagniram vs. Shivshanker, AIR 1974 Bom. 40. In that case also, a similar preliminary objection was raised on behalf of the respondent that no LPA would lie against an order passed in FA by the learned Single Judge of the Bombay High Court under Section 72 of the Act, which was negatived by the Division Bench observing that proceedings before the learned Single Judge of the High Court can be said to be proceedings in FA and aggrieved party has right to file LPA under Clause 15 of the Letters Patent.

The question, therefore, before us is as to whether LPA against the order passed by the learned Single Judge in FA under Section 72 of the Act would be competent. In our opinion, such appeal would not lie and the point is no more res-integra as it is covered by the Division Bench of this Court in Hiragar Dayagar. In Hiragar Dayagar, almost in identical situation, the court was called upon to consider the provisions of Sections 70 to 76 of the Act read with Clause 15 of the Letters Patent and maintainability of LPA.

Clause 15 of the Letters Patent of Bombay as applicable to this Court, reads thus:

"15. And we further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of power of superintendence under the provisions of sec, 107 of the Government of India Act or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to sec. 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judger of any Division Court, pursuant to sec. 108 of the Government of India Act made (on or after the first day of February 1929) in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court , where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us. Our heirs or successors in Our or Their Privy Council, as hereinafter provided."

In Hiragar Dayagar, this Court observed that Clause 15 provides a right of appeal from a judgment of one Judge of the High Court to a Division Bench of the High Court. It, however, states that an appeal shall lie from "a judgment of one Judge of the High Court in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendence of the High Court where the Judge who passed the judgment declares that the case is a fit one for appeal". In other words, if a Single Judge of the High Court exercises appellate jurisdiction against a decree passed in exercise of appellate jurisdiction and renders a judgment, no appeal as of right would lie against such judgment.

In Hiragar Dayagar , ambit and scope of the expression `appellate jurisdiction' was considered by the Division Bench . Referring to the relevant provisions of the Act, Bhagwati, C.J. (as he then was) observed:

"The argument of the appellants was that sec. 72 sub-sec. (1) speaks only of an application to the court to set aside the decision of the Charity Commissioner and it does not provide for an appeal against the decision of the Charity Commissioner . It is significant,pointed out the appellants, that though the legislature has used the word "appeal" in Secs.. 70 and 71, it has departed from this nomenclature in sec. 72 and while dealing with the proceedings under sec. 72, it has deliberately and advisedly omitted to use the word "appeal" and characterised that proceeding as an application. The proceeding under sec. 72 cannot,therefore, be regarded as an appeal to the District Court against the decision of the Charity Commissioner and when the District Court exercises its jurisdiction in relation to an application under sec. 72, it does not exercise appellate jurisdiction but it exercises a special jurisdiction conferred upon it by sec. 72. If, contended the appellants, the legislature intended to confer appellate jurisdiction on the District court, the legislature would have used the well known and familiar expression "appeal" which it has used in Secs.. 70 and 71 but the legislature not having used this expression, the inference must be inevitably raised that t he jurisdiction which the legislature intended to confer on the District court under sec. 72 was not appellate jurisdiction but jurisdiction of a special nature. The Charity Commissioner who is the fourth respondent before us supported this line of argument advanced on behalf of appellants. Respondents Nos. 1 to 3, however, urged that the nomenclature used by the legislature in sec. 72 was immaterial. What was required to be considered was as to what was the real nature and character of the jurisdiction conferred on the District court and this could be determined only on a proper consideration of the scope and ambit of the powers exercisable by the District court in an application under sec. 72. Respondents Nos.1 to 3 pointed out that the powers conferred on the District court while dealing with an

application under sec. 72 were, clearly appellate powers and though the word "appeal" was not used by the legislature, it was really appellate jurisdiction which was being exercised by the District court while dealing with an application under section 72. These were the rival contentions of the parties which we shall now proceed to consider."

Considering earlier decisions, the Court proceeded to state:

"Now, it may be noticed that the District court in an application under sec. 72 is given the power to confirm revoke or modify the decision of the Charity Commissioner and there are no limits or fetters upon this power. The entire matter which was before the Charity Commissioner is at large before the District court and the District court has full and complete power to review the decision of the Charity Commissioner , either on law or on fact, in such manner as it thinks proper. If this be not an appellate power, it is difficult to see what else it can be. It is true that the Charity Commissioner is not subordinate to the District court in the sense that the District court has no power of superintendence over the Charity Commissioner but there can be no doubt that inter alia in the matter of his decisions under sec. 70, the Charity Commissioner is inferior to the District court in that the District court has power to revoke or modify his decisions. What is of the essence of an appeal is that a superior tribunal should have the power to review the decisions of the inferior tribunal and that power of the District court certainly has under sec. 72. The District court, as we have already pointed out, may confirm, revoke or modify the decisions of the Charity Commissioner on an application under sec. 72. The District court may also, in the exercise of its inherent power under section 76 read with sec. 151 of the Code of Civil Procedure, make an order of remand to the Charity Commissioner, if the District court thinks it necessary to do so in a proper case. Vide Chandrakant v. Charity Commissioner, VI GLR 649. We may point out that sub-section (1A) of sec. 72 also reinforces the view that the power conferred on the District

court under sec.72 is an appellate power. The provision enacted in sec. (1A) of sec. 72 is in identical terms as Order 41 Rule 27 of the Code of Civil Procedure and it emphasizes that what the District court is called upon to do under sec. 72 is to review the correctness of the decision of the Charity Commissioner on the evidence which was before him and this is clearly a charateristic of appellate power. There can, therefore, be no doubt that though the word "appeal" is not used by the Legislature and the proceeding under sec. 72 is designated as an application, the jurisdiction conferred on the District court while dealing with such proceeding is appellate jurisdiction. (emphasis supplied)

The Court thus concluded that when the District Court dealt with an application under Section 72 of the Act, it exercised appellate jurisdiction and when the learned Single Judge heard an appeal against that order, he can be said to have exercised appellate jurisdiction against a decree passed in exercise of appellate jurisdiction and consequently, no LPA would lie without getting a certificate of fitness from the learned Single Judge who decided the matter. Since in that case, no such certificate of fitness was obtained, LPA was held not maintainable.

It is no doubt true that the Division Bench of the High Court of Bombay in Khivaraj Chhagniram had taken a contrary view. But apart from the fact that the said judgment is not binding to this court and Hiragar Dayagar is binding to us, reading Khivaraj Chhagniram, it is obvious that attention of the Court was not invited to the decision of this Court in Hiragar Dayagar. Moreover, the Division Bench of the Bombay High Court in Khivaraj Chhagniram did not consider relevant provisions of the Act. It was also of the view that Clause 15 of the Letters Patent must be construed in the light of the words and expressions used therein by giving natural meaning and one should not go beyond the express language of the said Clause.

The Court stated:

"14. It may be remembered that a remedy like an appeal is a creature of law. Unless an appeal is so provided, there does not seem any right in a

litigant to approach some higher court or tribunal by way of an appeal. The expression "appeal" is also a term of an art. The legislature which is fully aware of the difference between the various remedies has chosen in the circumstances of this case, the expression may.... apply' under section 72 as against the expression `an appeal' under sections 70 and 71. Ordinarily, it is true that wen original jurisdiction is being exercised the litigating parties have a right to lead evidence., It is a fundamental right of a party of being heard. The hearing which denies the right of leading evidence could hardly be described as hearing However, we do not think how the legislature could not divide the right of being heard into different parts and provide a particular tribunal for leading evidence and another tribunal having a higher experience and position to re-examine the entire evidence recorded, by way of of an independent remedy. Whether this remedy would be an appeal must depend upon the language used by the legislature. It may be that the functions performed by the court under this remedy may have similarity with the functions performed otherwise by the appellate courts. It may be that the legislature has resorted to this time saving device by directing evidence to be recorded before the Deputy or Assistant Charity Commissioner and a further examination of that evidence by way of an appellate remedy by a higher departmental officer viz. Charity Commissioner. However, when the first remedy to approach to a civil court is made available the legislature has in terms provided an application and not an appeal. It would not be therefore proper to confuse the nature and the functions of the court under section 72 with the technical remedy of an appeal which has to be so provided by the legislature." (emphasis supplied)

The Court, therefore, concluded:

"16. In the present case, the narrow question is, whether the Letters Patent Appeal could be filed, as the language goes, as of right or must be filed only with the leave of the learned Single Judge? Undoubtedly both are rights of

> appeal. In one case the party can directly approach a Division Bench and try its luck. In the other case, he has first to obtain leave of that Judge who had decided the matter and then file the appeal. Undoubtedly, the second remedy is more onerous and seeks to curtail the right of appeal to some extent. If it could be held in the present case that the court under section 72 was itself exercising the appellate jurisdiction, then undoubtedly, the present appeals filed without the leave of the learned Single Judge are incompetent. Such appeals lie only with his leave and not otherwise. If otherwise it could be held, as the natural meaning of the expression suggests, that section 72 provides a remedy by way of an application only, and though the inquiry held by the District court seems to have some semblance of an appellate jurisdiction, it is not a jurisdiction created by the legislature as an appellate jurisdiction. It is only where the jurisdiction is appellate and a decision in exercise of such jurisdiction is given, and the High court has also exercised the appellate jurisdiction, that the bar contemplated by Clause 15 of the Letters Patent of obtaining leave of the court seems to come in."

On the basis of the above reasoning, the court negatived the preliminary objection raised on behalf of the respondent and held that LPA was maintainable.

We may, however, state that after Hiragar Dayagar, and Khivaraj Chhagniram , the point came up for consideration before the Supreme Court in Ramchandra Govardhan Pandit vs. Charity Commissioner, State of Gujarat, AIR 1987 SC 1598. The Apex Court was called upon to consider correctness or otherwise of two conflicting views - one of the High Court of Gujarat in Hiragar Dayagar and other of the High Court of Bombay in Khivaraj Chhagniram . Approving the view of the High Court of Gujarat and over-ruling the view of the High Court of Bombay, the Supreme Court observed:

> "8. We have considered the reasoning in the three judgments referred above. With respect, we find it difficult to agree with the reasoning in AIR 1974 Bom. 40. We agree with the reasoning in the other two cases. The slender thread on which the appellants' arguments rest is the

absence of the word "appeal" in S. 72 (1). That alone cannot decide the issue. If the well known word "appeal" had been used in this section that would have clinched the issue. It is the absence of this word that has necessitated a closer scrutiny of the nature, extent and content of the power under S. 72 (1).

9. The power of the District Court in exercising jurisdiction under S.72 is a plenary power. It is true that the Commissioner is not subordinate to the District Court but the District Court has power to correct, modify, review or set aside the order passed by the Commissioner. All the characteristics of an appeal and all the powers of an appellate court are available to the District Court while deciding an application under S.72. To decide this case,we must be guided not only by the nomenclature used by the section for the proceedings but by the essence and content of the proceedings. That being so, we have no hesitation to hold that the proceedings before the District Court under S. 72 (1) are in the nature of an appeal and that District Court exercises appellate jurisdiction while disposing Court and hence Cl.15 of the Letters Patent is directly attracted." (emphasis supplied)

The above view was reiterated by the Supreme Court in Naranbhai Dayabhai Patel vs. Suleman Isubji Dadabhai, AIR 1996 SC 1184.

From the above discussion, in our judgment, the legal position is fairly well settled and it is that when a Single Judge of a High Court renders a judgment in exercise of jurisdiction under Section 72 of the Bombay Public Trusts Act, 1950, he exercises appellate jurisdiction against a decree passed or order made in exercise of appellate jurisdiction. To put it differently, he exercises jurisdiction as a second appellate Court and not as a first appellate Court and hence, a party aggrieved by a `judgment' rendered by the Single Judge cannot, as of right, file an intra-court appeal to a Division Bench of the same High Court without obtaining certificate of fitness from the Single Judge who decided the matter.

At this stage, learned counsel for the appellant submitted that he would seek a certificate of fitness

from the learned Single Judge and file an intra-court appeal. We are afraid, even that course is now no more open to the appellant in view of amendment and insertion of Section 100-A in the Code of Civil Procedure, 1908 as inserted by Act 104 of 1976. The said section reads :

" 100A. Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment,decision or order of such single Judge in such appeal or from any decree passed in such appeal."

We may state that constitutional validity of Section 100-A is not challenged before us. In view of provisions of Section 100A, now, no LPA against an order passed by the learned Single Judge of this Court would be competent. There is, therefore, no question of obtaining certificate of fitness from the learned Single Judge who delivered the judgment impugned in the present LPA.

For the foregoing reasons, we are of the view that the present LPA is not maintainable and deserves to be dismissed only on that ground. We may state that as we are holding LPA to be incompetent and dismiss it only on that ground, we refuse to enter into merits of the matter. LPA is accordingly dismissed.

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parekh